

**REDACTED DECISION – DOCKET NUMBER 10-383 W - BY GEORGE V. PIPER,
ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON AUGUST 25,
2011 – ISSUED ON FEBRUARY 27, 2012**

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER'S DUTY TO WITHHOLD -- "Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . ." W. Va. Code Ann. § 11-21-71 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- EMPLOYER'S LIABILITY FOR WITHHELD TAXES -- "Every employer required to deduct and withhold tax under this article is hereby made liable for such tax." W. Va. Code Ann. § 11-21-75 (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- PENALTIES FOR FAILURE TO ACCOUNT FOR AND PAY OVER -- ". . . Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. . . ." W. Va. Code Ann. § 11-10-19(a) (West 2010).

PERSONAL INCOME TAX WITHHOLDING -- OFFICERS PERSONALLY LIABLE FOR TAX DEFAULT OF CORPORATION -- "If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent" *See* W. Va. Code Ann. § 11-15-17 (West 2010).

PERSONAL INCOME TAX WITHHOLDING – NECESSITY OF FINDING OF FUNDAMENTAL FAIRNESS BEFORE OFFICER LIABILITY CAN BE SHOWN -- Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, "may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test." In *Schmehl v. Helton*, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

PERSONAL INCOME TAX WITHHOLDING -- OFFICER LIABILITY NOT SHOWN -- Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious to impose liability on a corporate officer who neither lived or worked in the State of West Virginia; who had absolutely no involvement in the day-to-day operations of the corporation.

PERSONAL INCOME TAX WITHHOLDING -- NO SHOWING OF WILLFULLNESS -- The Petitioner showed that he never willfully attempted to evade or defeat the withholding tax of Company A or the payment of the same.

WEST VIRGINIA OFFICE OF TAX APPEALS – BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET – Petitioner, in this matter, has carried his burden of proving that the assessment of taxes against him is erroneous, unlawful, void or otherwise invalid.

CORRECTED

FINAL DECISION

On July 19, 2010, the Compliance Division of the West Virginia State Tax Commissioner's Office (Respondent) issued a personal income tax withholding money penalty assessment against the Petitioner, in his capacity as an officer of Company A. This assessment was issued, pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Article 10, Section 19 of the West Virginia Code. The assessment was for the period of November 1, 2005, through September 30, 2006, for a total assessed money penalty liability in the amount of \$_____.

Written notice of the assessment was served on the Petitioner, as required by law.

Thereafter, by mail postmarked September 17, 2010, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. Company A is a member-managed, foreign limited, liability company which conducted business as an assisted living facility, effective March 11, 1999.

2. Petitioner is listed on the West Virginia Secretary of State's on-line data screen, as manager of Company A, whose address is in the State of Maryland.

3. By letter dated August 16, 2011, Petitioner was advised by the Internal Revenue Service that his request for a refund was going to be granted. These monies had been attached by the IRS, for a tax liability of Company A (Petitioner's Exhibit No. 1).

4. In a letter dated April 28, 2005, Petitioner states that Mr. A had assumed responsibility as managing partner of Company A about 18 months earlier; that the arrangement had not changed, and that Petitioner, among others, was concerned that the financial matters remained outstanding because of Mr. A's poor leadership and that new leadership may be required (Petitioner's Exhibit No. 2).

5. During the periods in question, Petitioner had absolutely no involvement in the day-to-day operations of Company A.

6. Petitioner is a licensed Maryland physician, who lives in Maryland; and never had an office or residence in the State of West Virginia.

7. The managing members, during the audit periods, were Mr. A and Mr. B; and they, not the Petitioner, determined the financial policies for the business, did the hiring and firing of employees, handled the payroll, signed payroll checks, made deposits and filed the withholding tax returns.

8. Petitioner was a managing member from 1999 to 2003 and during that period of time all taxes were paid; however, during a telephone conversation in the year 2003 he was removed as a managing member, although he never received anything in writing to that effect.

9. All of the Petitioner's testimony was un rebutted.

DISCUSSION

The sole issue to be determined is whether the Petitioner is liable for the personal income tax withheld from the pay of Company A's employees, but never remitted to the State of West Virginia.

With respect to the personal income tax withheld from the pay of the corporation's employees, West Virginia Code Section 11-21-71(a) states that "every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual shall deduct and withhold such wages for each payroll period a tax computed in such manner . . . an amount substantially equivalent to the tax reasonably estimated to be due under this article . . ." W. Va. Code Ann. § 11-21-71(a) (West 2010).

Section 75 of Article 21 states that, if the required withholding does not occur or if the required amounts are not remitted to the Tax Commissioner, the employer is liable for the uncollected and unpaid amounts. *See* W.Va. Code Ann. § 11-21-75 (West 2010).

It should be noted that the Tax Commissioner issued the assessment in this matter pursuant to West Virginia Code Section 11-10-19(a) which states, “any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over” W. Va. Code Ann. § 11-10-19(a) presumably the Tax Commissioner believes that the Petitioner is a “person required to collect, account for and pay over” the unpaid withholding tax liabilities of Company A, because he was an officer of Company A.

Section 17 of Article 15, Chapter 11, provides that officers of an association or corporation “. . . shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed . . . may be enforced against them as against the association or corporation which they represent.” W. Va. Code Ann. § 11-15-17 (West 2010). Neither party raised the issue of the presumed default of Company A with regard to its unpaid withholding tax liabilities. Taking the default as a given, the Petitioner would be liable for Company A’s default, were it not for the West Virginia Supreme Court of Appeals holding in *Schmehl v. Helton*, 222 W. Va. 98, 662 S.E.2d 697 (2008). The *Schmehl* Court addressed the constitutionality of West Virginia Code Section 11-15-17 and the Tax Commissioner’s practice of holding officers liable for the defaults of a corporation, merely by virtue of their position as an officer. In Syllabus point 3 the *Schmehl* Court states:

Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to *West Virginia Code*, 11-15-17 [1978]; such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence, giving due deference to the statute's general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

Schmehl, at Syl. pt. 3.

Applying the test to the assessment for the un-remitted withholding taxes in this matter reveals that it would be fundamentally unfair to impose liability on a corporate officer who as a licensed physician, lived and worked in the state of Maryland, never lived or worked in the State of West Virginia and who had absolutely no involvement in the day-to-day operations of Company A. Additionally, West Virginia Code Section 11-10-19(a) states that the person required to collect, account for and pay over any tax, (in this case an officer of a corporation that has defaulted) must have willfully attempted to evade or defeat the tax or payment of the tax. Here, there has been no showing of willful conduct on the part of the Petitioner.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “Every employer maintaining an office or transacting business within this state and making payment of any wage taxable under this article to a resident or nonresident individual, shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee’s wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article . . .” W. Va. Code Ann. § 11-21-71 (West 2010).

3. “Every employer required to deduct and withhold tax under this article is hereby made liable for such tax. . . .” W. Va. Code Ann. § 11-21-75 (West 2010).

4. “. . . Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over...” W. Va. Code Ann. § 11-10-19(a) (West 2010).

5. “If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed...may be enforced against them as against the association or corporation which they represent” W. Va. Code Ann. § 11-15-17 (West 2010).

6. Liability upon a corporate officer for the default of his or her corporation, for unpaid taxes, “may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test.” *Schmehl v. Helton*, Syl. pt. 3, 222 W. Va. 98, 662 S.E.2d 697 (2008).

7. Applying the test in *Schmehl*, it would be fundamentally unfair, arbitrary and capricious to impose liability on a corporate officer who neither lived nor worked in the State of West Virginia; who had absolutely no involvement in the day-to-day operations of the corporation.

8. The Petitioner showed that he never willfully attempted to evade or defeat the withholding tax of Company A or the payment of the same.

9. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2. (2003)

10. Petitioner in this matter has carried his burden of proving that the assessment of taxes against him is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the personal income tax withholding money penalty assessment issued against the Petitioner in his capacity as an officer of Company A, under the provisions of Chapter 11, Article 10, Section 19 of the West Virginia Code, for the period of November 1, 2005, through September 30, 2006, for a total assessed money penalty liability in the amount of \$_____ should be and is hereby **VACATED**, and the Petitioner owes no further tax liability for the period in question.

WEST VIRGINIA OFFICE OF TAX APPEALS